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No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ, ESQUIRE; AND
BOWMAN, HEINTZ, BOSCIA & MCPHEE,
PETITIONERS,

V.

DARLENE JENKINS,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE *

The National Association of Retail Collection Attorneys (NARCA) is a non-profit trade association organized to promote the image and function of attorneys practicing in the fields of collection of consumer debt, creditors rights and creditor representation in bankruptcy proceedings. NARCA seeks to elevate ethical standards and improve the practice of law by creditor attorneys.

Formed less than two (2) years ago, NARCA has experienced remarkable growth. Presently, NARCA's membership includes more than 730 law firms practicing in 49 of the 50 states. Law firms which have devoted at least 25% of their practice to the field of consumer collections for the past five (5) years are eligible for membership. NARCA requires all member firms to certify that they are not subject to any attorney disciplinary proceedings.

NARCA serves its members through educational programs, including seminars on the Fair Debt Collection Practices Act (FDCPA). In the short time since NARCA was formed, it has sponsored four (4) major national conventions attended by its member attorneys as well as business representatives from the credit community. Because NARCA members regularly practice in the field of consumer collections and pursue collection of accounts outside of litigation, they are subject to the FDCPA.

NARCA urges reversal of the Court of Appeals for the Seventh Circuit in this case because a broad application of FDCPA provisions to attorneys engaged in litigation could impose liability on collection attorneys in situations where the attorney acts in good faith as a client's advocate.

* The consent of the Petitioner and Respondent to the filing of this Brief are attached in the Appendix.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Seventh Circuit erred by expanding the Fair Debt Collection Practices Act (hereinafter referred to as the "FDCPA" or the "Act") to include litigation activities performed by attorneys. Although attorneys performing traditional non-litigation activities were included within the coverage of the Act in 1986, neither the language of the Act nor its purpose, to regulate unscrupulous non-litigation conduct of debt collectors, allows for an interpretation so broad so as to include litigation activities.

By applying the well established statutory construction rule of examining a statute as a whole to the instant case, it is evident that only a single provision of the Act, the forum abuse provision found in 15 U.S.C. § 1692i, applies to litigation activities. The Seventh Circuit failed to examine the statute as a whole, and in its analysis interpreted a single provision of the statute in a vacuum resulting in a reading inconsistent with the Act's language and purpose.

However, even if the Act when examined in its entirety is interpreted to apply to litigation activities, this Court should look beyond the literal language of the Act into its purpose and intent due to the absurd results which would result. For instance, if the Act were interpreted to govern litigation activities, a debtor could stop a trial in its tracks by invoking 15 U.S.C. § 1692c(c) requiring all communication with a debtor to cease at his or her request. If the Act were interpreted to govern litigation activities an attorney would be precluded from presenting their client's case to the court due to the prohibition on communicating with third parties. 15 U.S.C. § 1692c. And finally, if litigation activities were included within the Act's confines, the Federal Trade

Commission would be empowered to issue cease and desist orders in the midst of litigation, a violation of the separation of powers doctrine.

The FDCPA was designed to eliminate abusive conduct of debt collectors outside of the litigation arena where consumers can be victimized. But the judicial system has established adequate protections and recourse for aggrieved debtors should an attorney act improperly during the course of litigation. To apply the FDCPA to litigation activities skews the purpose and language of the Act, ignores the sponsor's intent and completely alters the manner in which the judicial system currently operates.

ARGUMENT

I. THE FAIR DEBT COLLECTION PRACTICES ACT SHOULD NOT BE JUDICIALLY EXPANDED BEYOND ITS PROVISIONS TO REGULATE ATTORNEYS ENGAGED IN LITIGATION.

INTRODUCTION

In 1977, Congress passed the Fair Debt Collection Practices Act in response to "abundant evidence of the use of abusive, deceptive and unfair debt collection practices." 15 U.S.C. § 1692(a). These practices included late night phone calls to debtors, use of obscene language, threats of imprisonment, and the use of false and misleading representations in collecting consumer debts. Congress declared the statute's purpose was "to eliminate abusive debt collection practices, to insure that debt collectors who refrain from abusive practices are not competitively disadvantaged, and to promote consistent action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

Initially, the FDCPA exempted attorneys who engaged in debt collection. However, in 1986 the Act was amended by Congress through repeal of the attorney exemption[1] in light of evidence that attorney debt collectors were soliciting business by touting their exemption from the Act and were engaging in practices which would otherwise be prohibited

[1] Fair Debt Collection Practices Act, Pub. L. No. 99-361, 100 Stat. 768 (codified as amended at 15 U.S.C. § 1692a)

under the FDCPA. H.R. REP. NO. 405, 99th Cong., 2d Session, 5 (1986) *reprinted in* 1986 U.S.C.C.A.N. 1756. The repeal of the attorney exemption ensured that all firms in the business of debt collection "abide[d] by the same rules." *Id.* The sponsor of the legislation repealing the exemption, Rep. Frank Annunzio, made it abundantly clear that the FDCPA "only affects conduct in the backroom, not the courtroom."[2]

A. THE SEVENTH CIRCUIT ERRONEOUSLY EXPANDED THE FAIR DEBT COLLECTION PRACTICES ACT BY CREATING LIABILITY ON ATTORNEYS ENGAGED IN LITIGATION ACTIVITIES

In the instant case, the Seventh Circuit expanded the breadth and reach of the FDCPA into a forum which it was never intended to regulate - the judicial system. The court below held that an attorney who files a civil complaint on behalf of a client and who subsequently corresponds with the defendant's attorney is subject to liability under 15 U.S.C. § 1692f(1) for collecting a debt through false and misleading representations if the debtor proves that <u>any</u> amount sought is not "expressly authorized by the agreement creating the debt or permitted by law."[3] This overreaching decision imposes strict liability on any attorney whose client sued for a sum greater than the amount actually awarded by the court after trial. *Contra, Green v. Hocking*, 9 F.3d 18, 22 (6th Cir.

[2] 132 CONG. REC. 10,031 (1986).

[3] *Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir. 1994).

1993), in which the Sixth Circuit declared it was "unwilling to impose a system of strict liability that conflicts with the current system of judicial regulation."

Under the Seventh Circuit's interpretation of the Act, a judgment for any amount less than what was sought, even a verdict reduced by one dollar ($1.00), may result in an FDCPA action against the creditor's attorney who filed the suit. An FDCPA suit subjects the creditor's attorney to $1,000.00 in statutory damages, plus any actual damages, plus attorney's fees incurred by the debtor,[4] the sums of which may geometrically exceed the credit or offset awarded to the debtor by the trial court. The Seventh Circuit's strained reading of the Act would mandate this absurd result because if, as the court below suggests, all provisions of the FDCPA must be literally interpreted, the FDCPA must apply to attorneys engaged in litigation as well as non-litigation debt collection activities.

In construing separate provisions of the FDCPA far out of context, the court below failed to follow the well established statutory construction rule, as recently restated by this Court in *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991), that a statute must be read as a whole regardless of the clarity of a particular provision since "the meaning of statutory language, plain or not, depends on context." In *King*, this Court refused to read into the Veterans' Reemployment Rights Act a time limitation of civilian reemployment for employees entering military service where none was expressly stated. Although the remainder of the statute contained provisions granting up to five (5) years of job protection, 38 U.S.C. § 2024(d) did not. Where the

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[4] 15 U.S.C. § 1692k.

statute was "utterly silent" as to a time limitation, this Court refused to read one into it and allowed employees invoking this provision unlimited job protection. *King*, 112 S. Ct. at 573. "In so concluding we do nothing more, of course, than follow the cardinal rule that a statute must be read as a whole." *Id.* at 574. *See also, U.S. Nat'l Bank of Oregon v. Indepen. Insur. Agents of America*, 113 S. Ct. 2173, 2182 (1993) holding that "in expounding a statute, [the Court] must not be guided by a singular sentence, . . . but [must] look to the provisions as a whole, and to its object and policy."

Similarly, in the instant case, with the exception of a single provision, found at 15 U.S.C. § 1692i, which limits the venue of debt collection suits, the FDCPA is utterly silent as to application of the remainder of its provisions in the litigation arena. Without the type of express provision governing litigation found at 15 U.S.C. § 1692i, this Court should refuse to implicitly read one into the remainder of the FDCPA. In *King*, this Court refused to read into a single provision time limitation language found in the remainder of the statute. In the instant case, language addressing litigation is found only in a single provision and should not be read into the remainder of the FDCPA. Although the instant case presents the reverse situation found in *King*, the guiding principle is the same - express language in one provision should not be implicitly read into other sections of a statute.

The Seventh Circuit ignored this vital rule of statutory interpretation by reading a single provision of the FDCPA and applying it out of context to the litigation process. The FDCPA was never intended, nor written, to govern litigation activities. By undertaking an examination of the FDCPA as a whole, its guiding principles become evident. First, the Act

practices..." amid evidence of deceptive and unfair means utilized to collect debts. 15 U.S.C. §§ 1692(a) & (e). The purpose clause makes no mention of regulating conduct in the courtroom. A contrast is therefore evident between regulating "debt collection practices" under the FDCPA and non-covered litigation aimed at obtaining a judgment for a past due obligation.

Second, the substantive provisions of the statute contain only a single provision relating to litigation - the forum abuse provision found in § 1692i.[5] Most significantly, the provision is entitled "Legal actions by debt collectors" and in pertinent part states that "Any debt collector who brings any legal action on a debt against any consumer shall - (2)...bring such action only in the judicial district or similar legal entity - (A) in which such consumer signed the contract sued upon; or (B) in which the consumer resides at the commencement of the action." 15 U.S.C. § 1692i. This section is the only one in the Act which addresses litigation activities conducted by debt collectors.

No other provisions of the Act prescribe conduct in the litigation arena, where litigants are already protected by comprehensive court rules and procedures designed to ensure fair and impartial hearings. The other FDCPA prohibitions are directed at unsavory tactics and wholesale abuses by debt

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[5] The forum abuse standard is based on "the fair venue standard" adopted by the Federal Trade Commission., *See*, S. REP. NO. 382, 95th Cong., 1st Sess. 2, (1977) *reprinted* in 1977 U.S.C.C.A.N. 1699. *See also*, *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976), upholding an FTC finding that mail-order catalogue business engaged in an unfair trade practice by suing all customers in Cook County, Illinois, regardless of the residence of the customer, despite the creditor's arguable claim of long-arm jurisdiction.

collectors in dealing with debtors outside of the litigation process where debtors lack the benefit of judicial protections.

The remainder of the Act contains specific non-litigation protections and prohibitions. It outlaws abusive, deceptive and unfair practices and imposes mandatory disclosure requirements. 15 U.S.C. § 1692g requires a debt collector to send a written notice to the debtor within five (5) days of an initial communication with the consumer setting out the consumer's rights to request validation of the debt. In addition, to guard further against misleading communications, 15 U.S.C. § 1692e(11) requires a disclosure in each communication with a debtor that the purpose of the communication is "to collect a debt and that any information obtained will be used for that purpose."

Further, the Act limits permissible communications with the debtor and third parties under 15 U.S.C. §§ 1692b and 1692c. Harassment or abuse, false or misleading representations and unfair debt collection practices are also prohibited under 15 U.S.C. §§ 1692d, e and f. Finally, the statute prohibits the use of misleading forms. 15 U.S.C. § 1692j.

By narrowly focusing on 15 U.S.C. § 1692f and molding the statute into a litigation control device, the Seventh Circuit erred by failing to take into account the statute as a whole. The lower court erroneously extended the reach of the FDCPA well beyond the holdings in *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992) and *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994). In those cases, the Fourth and Ninth Circuits merely held attorneys who file debt collection lawsuits to the same venue standards as lay debt collectors. However, 15 U.S.C. § 1692i is the only provision governing litigation. By judicial fiat, the

Seventh Circuit found that the remainder of the Act applies to litigation activities despite the absence of language indicating such an expansive reading of the Act, and contrary to the sponsor's clearly stated intent.

B. THE FDCPA AS A WHOLE IS DESIGNED TO CURB ABUSES WHICH EXIST OUTSIDE OF THE PROTECTIONS INHERENT IN THE JUDICIAL PROCESS.

It is evident that when examined in its entirety, the FDCPA focuses on prohibitions such as harassment or abuse, false or misleading representations and unfair practices, all of which are unscrupulous acts by debt collectors outside of litigation. To apply these provisions to attorneys who have been retained to enforce the legal rights of their clients during the course of litigation results in nothing less than what the Sixth Circuit has termed an "absurd outcome." *Green v. Hocking*, 9 F.3d at 21.

Harassment or abuse outside of the protections inherent in the judicial system can be intimidating and overwhelming to the debtor. The FDCPA defines harassment or abuse as conduct "the natural consequence of which is to harass, oppress or abuse any person in connection with the collection of a debt." The Act lists six (6) specific forms of harassment including; threats of violence, use of obscene language, publication of "deadbeat" lists, offers to sell debts to coerce payment, placing of repeated telephone calls, and making telephone calls without properly identifying the caller. 15 U.S.C. § 1692d. These excesses would tend to coerce payment from a vulnerable debtor, and accordingly apply in the same manner to attorneys and lay debt collectors engaging in non-litigation collection activities.

Such conduct, however, stands in stark contrast to a situation where a debtor receives a summons to appear in court at a convenient location. The debtor has the opportunity to appear in court, to air any dispute before a neutral tribunal, and to require the creditor's attorney to meet their client's burden of proof to establish that the debt is owed.

The FDCPA also punishes false and misleading conduct which deceives or misleads the consumer into paying the debt based on false representations that the collector has taken specific legal steps.[6] But a lawyer who files a lawsuit is constrained to abide by court rules of practice and procedure designed to give each party an equal chance to produce evidence and testimony. Moreover, there are "elaborate controls on lawyers' conduct through the Rule 11 process or through similar state court procedures." *Green v. Hocking*, 9 F.2d at 22.

The unfair collection practices proscribed by 15 U.S.C. § 1692f are also aimed at curbing other non-litigation abuses, such as collection of "more than is legally owing,"[7] misuse of post-dated checks and making unauthorized collect calls. These prohibitions would also reach attorneys outside of litigation.

The Seventh Circuit erred and misinterpreted 15 U.S.C. § 1692f(1) by holding that an attorney "collects" an amount not permitted by law by merely filing suit on behalf of a client who may ultimately be awarded less than the

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[6] 15 U.S.C. § 1692e prohibits many false representations as to: (2) the legal status of the debt, (3) whether the collector is an attorney, (4) the legal basis for seizure of the debtor's property, (5) whether a suit will be filed, (9) the official status of a document, and (13) whether a summons is genuine.

[7] S. REP. NO. 382, 95th Cong., 1st Sess. 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1698.

amount sought in the complaint. However, the true purpose of 15 U.S.C. § 1692f, when considered in context, bans practices used outside the scope of litigation. For example, payment by a post-dated check, in connection with a court approved settlement or in consideration of a voluntary dismissal of a pending suit, is quite different than where a collector makes unlawful threats of criminal prosecution to induce payment by a post-dated check. This is why Congress did not expressly include litigation practices in these kinds of FDCPA prohibitions - because the judicial system exists as a truth-finder in resolving civil disputes and already provides protections against false and deceptive practices.

By reading certain provisions of the FDCPA out of context, the Seventh Circuit has unilaterally re-focused state judicial rules and procedures and accordingly placed enormous constraints and penalties on attorneys who represent clients in debt collection proceedings. In litigation, the plaintiff/creditor bears the burden of proof to establish its claim. If there is insufficient proof, the debtor will prevail.

Moreover, there are numerous judicial protections in place to ensure the integrity of the process. If a creditor or its attorney brings a claim without adequate cause, with no merit or with the intent to delay, hinder or harass the debtor, sanctions are available to the debtor. *See, e.g.* FED. R. CIV. P. 11 and Illinois Supreme Court Rule 137 (134 Ill.2d R. 137). Moreover, if the creditor or attorney pursues a fraudulent claim or engages in abusive litigation conduct, common law causes of action are available to the debtor, including abuse of process and malicious prosecution.

At first glance, it may not seem unreasonable to apply a particular provision of the FDCPA to punish alleged deceptive conduct by an attorney in litigation. However, this Court must resist the inclination to find in the Respondent's favor merely on account of the egregious attorney misconduct alleged in the Complaint - namely, that the Petitioners

knowingly filed suit for excessive amounts. If this Court holds that the FDCPA governs certain litigation conduct, an attorney litigating consumer debts would be left to speculate whether other FDCPA provisions, including those imposing liability regardless of fraudulent or deceptive intent, would apply to litigation. For example, 15 U.S.C. § 1692e(5) outlaws threats of actions which "cannot legally be taken." "Assuming a lawsuit is brought, and the consumer prevails to any extent . . . the law has been broken as the (attorney) threatened to take action that . . . as a result of the judgment, 'cannot be legally taken.'" *Green v. Hocking*, 9 F.2d at 21. This newly, judicially re-written FDCPA would bring nothing less than chaos to a legal system which strikes a fair balance between the rights of litigants and the efforts to seek the truth.

This Court can also rest assured that the Respondent herein already has adequate common law and judicial remedies available to recover against an attorney who knowingly engages in wrongful conduct in connection with litigation. *See, e.g. Burnap v. Marsh*, 13 Ill. 535 (1852), where the Illinois Supreme Court held an attorney liable for malicious prosecution in knowingly pursuing a client's illegal motive by causing a debtor's wrongful arrest.

Application of the FDCPA to lawyers engaged in litigation tortures the meaning and focus of the Act. A debtor can be easily victimized outside of court. Once the debt is subject to suit, however, the protections afforded by the judicial system ensure against abuse. Congress saw fit to regulate the venue of collection actions to make sure each debtor could easily travel to court for trial. The FDCPA makes no other mention of legal action. This Court should reverse the Seventh Circuit's decision imposing liability on attorneys in litigation.

II. A LITERAL APPLICATION OF THE FDCPA TO LAWYERS ENGAGED IN LITIGATION WOULD PRODUCE ABSURD AND UNINTENDED RESULTS.

A. ABSURD RESULTS FOLLOW FROM A LITERAL APPLICATION OF THE FDCPA TO LITIGATION CASES.

Even if this Court were to conclude that an examination of the statute as a whole results in a reading consistent with the Seventh Circuit's ruling, the Court should look beyond the plain language of the statute and into the intention of the drafters if a literal application of the statute produces absurd results. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989). In that case, this Court addressed the question of whether post-petition interest on an over-secured pre-petition tax lien was allowable under 11 U.S.C. § 506(b) where the lien was non-consensual in nature. This Court looked beyond the literal language of the statute, noting that in circumstances where the result is at odds with the drafters' intent and would result in an absurdity, the intent rather than the strict language of the legislation controls. Accordingly, this Court held that consensual and non-consensual liens would be treated similarly under the law. *See also, U.S. v. X-Citement Video, Inc.*, 1994 U.S. LEXIS 8601, at *5 (U.S. Supreme Court) (rejecting literal, natural, grammatical reading of Protection of Children Against Sexual Exploitation Act where such a reading would produce anomalous and absurd results).

Likewise, in the instant case, the result of so broadly interpreting the FDCPA and applying it within the confines of litigation leads to a myriad of unintended and illogical results described herein. One of the important consumer protections contained within the framework of the FDCPA

provides that a debt collector must cease further communication with the debtor upon written request. 15 U.S.C. § 1692c(c). A communication is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). (Emphasis supplied).

If this provision of the FDCPA is applied to lawyers engaged in litigating consumer debt cases, a consumer, either through counsel or *pro se*, could demand that the attorney cease communication concerning collection of the debt. The lawyer would then be precluded from filing further pleadings, conducting a deposition of the debtor, and cross-examining the debtor during trial.[8] It is illogical to think that Congress intended such a result.

Taken one step further, "(i)f an attorney writes a first letter, and the consumer asks that communication cease, it would be unlawful to instigate a lawsuit." *Green v. Hocking*, 9 F.2d at 21. This absurd result inextricably leads to the logical explanation that the FDCPA was never intended to regulate lawyers engaged in litigation, and in fact this explanation was given by the Act's sponsor.

Further, the Act also prohibits a debt collector from communicating with third parties concerning the debt except to acquire "location information." 15 U.S.C. §§ 1692b, 1692c(b). During the course of litigation attorneys regularly communicate with third parties including juries, judges, clerks and bailiffs. This would be prohibited if the non-litigation sections of the FDCPA were construed to apply to

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[8] Ironically, the creditor could hire a third party attorney who does not regularly collect consumer debts to continue litigation of the claim. Unlike the debt collection attorney, the substitute attorney is exempt from FDCPA liability, even if the attorney maliciously pursues unfounded claims. This untoward and irrational result discriminates against attorney debt collectors and raises the spector of a violation of the Equal Protection Clause of the Fourteenth Amendment.

litigation activities. Moreover, if a witness or document subpoena is requested, information concerning the lawsuit, and concomitantly the debt, is conveyed to the recipient of the subpoena. It is unimaginable to think that the FDCPA was ever intended to restrict such permissible communications to third parties in the context of litigation.

If this Court holds that the FDCPA regulates all facets of the litigation process, the administrative agency charged with enforcement of the Act, the Federal Trade Commission, would be duty-bound to enforce its provisions against attorneys involved in litigation pursuant to authority granted by 15 U.S.C. § 1692l(a).[9] The FTC's administrative power under the FDCPA is exercised through the Federal Trade Commission Act and empowers the agency to issue cease and desist orders restraining unfair trade practices and to impose civil penalties on offending parties pursuant to 15 U.S.C. § 45. *See, e.g. U.S. v. ACB Sales and Service, Inc.*, 683 F. Supp. 734 (D. Ariz. 1987). This broad authority could conceivably be exercised to restrain attorneys engaged in litigation and undermine an attorney's ability to effectively represent a client in court.

Such a broad exercise of executive power over attorneys engaged in litigation would substantially interfere with and usurp the exclusive authority of the judicial branch of government to regulate the practice of law. *See generally*, *Ex parte Robinson*, 86 U.S. (19 Wall) 505 (1873) (the power

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[9] Current FTC enforcement policy provides that attorneys that engage in traditional debt collection activities are covered by the FDCPA, but lawyers whose practice is limited to legal activities are not. Statement of General Interpretation: Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 100 (1988). This enforcement policy, while not binding on the Court, is nonetheless persuasive. *See, e.g., Chevron U.S.A. v. Natural Defense Council*, 467 U.S. 837 (1984). This enforcement position would become obsolete if this Court ruled that the FDCPA governs attorneys involved in litigation.

to sanction and discipline attorneys is possessed by all courts having the authority to admit attorneys to practice); and *Theard v. United States*, 354 U.S. 278 (1957) (reciting basic tenent of judicial control over the conduct of attorneys).

B. APPLICATION OF THE FDCPA TO LAWYERS ENGAGED IN LITIGATION WOULD RENDER UNINTENDED RESULTS BY SIGNIFICANTLY ALTERING THE ATTORNEY-CLIENT RELATIONSHIP AND THE PRACTICE OF LAW.

Congress never intended for the FDCPA to affect attorneys representing their clients during the course of litigation. As stated by Rep. Frank Annunzio, the sponsor of the legislation, "[t]he removal of the attorney exemption will not interfere with the practice of law by the nation's attorneys. It will not prevent them from representing the interests of their clients. It will not subject them to onerous regulation." 131 CONG. REC. H. 10535 (daily ed. Dec. 2, 1985). However, the Seventh Circuit, in its ruling, completely ignored congressional intent and leapfrogged to the conclusion that "the Act reaches lawyers engaged in litigation." *Jenkins*, 25 F.3d at 539. That reach is broad and comprehensive.

Virtually all attorneys engage in some debt collection activities. The expansive definitions of a "consumer debt" and a "debt collector" under the Act includes the country lawyer collecting overdue accounts for the local fuel oil company, the small firm pursuing patient accounts for a neighborhood physician and the large firm doing collection work for its banking client. 15 U.S.C. §§ 1692a(5) and (6).

An attorney is deemed a debt collector under the FDCPA if the lawyer "regularly collects or attempts to collect debts . . . owed . . . to . . . another." 15 U.S.C. §

1692a. The regular collection of debts need not comprise any substantial portion of a lawyer's practice. A law firm whose debt collection practice is only 4% of its business is subject to the Act. *See, Stojnaovski v. Stroble and Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992). Only where an attorney handles debt collection matters on a rare basis, such as less than two per year, is the law firm exempt. *See, Mertes v. Tevitt*, 734 F. Supp. 872 (W.D. Wis. 1990).

The Act covers a multitude of non-litigation activities regularly engaged in by lawyers. Lawyers are subject to the Act when sending notices to debtors in foreclosure proceedings. *Crossley v. Leiberman*, 868 F.2d 566 (3rd Cir. 1989). Attorneys and law firms are subject to the FDCPA in the same manner as lay debt collectors if they send a pre-suit demand letter or engage in any communication with a debtor outside of litigation. *See, e.g., Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991); *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992). Accordingly, the effective result of the Seventh Circuit decision reaches well beyond traditional collection activities and into the litigation practices of many lawyers and law firms throughout the country.

A lawyer owes each client a duty of zealous advocacy tempered by solemn obligations to only pursue meritorious claims and to not knowingly misrepresent facts or law to the court. *See*, MODEL RULES OF PROFESSIONAL CONDUCT, RULES 3.1, 3.3 (1983). The honest, ethical attorney has much to fear from a ruling holding attorneys engaged in litigation to FDCPA liability. In all litigation there is a winner and a loser. A creditor's attorney who obtains anything less than full victory would become strictly liable to the debtor under the Seventh Circuit's ruling. *See, Green v. Hocking, supra.* This result would encourage litigation of every case, regardless of the disputed amount, and would discourage efforts at compromise and settlement by debtors

hoping for a windfall FDCPA case if the court enters any credit or offset against the amount claimed.

In repealing the attorney exemption to FDCPA, Congress neither intended nor contemplated expanding the reach of the statute so that it would infringe on the litigation process, which serves as the ultimate truth-finder. Nor did Congress intend to usurp authority from the judicial system in the regulation of attorneys involved in litigation. By broadly expanding the framework of the FDCPA, lawsuits against creditor attorneys who are merely fulfilling their professional responsibilities in enforcing their clients' rights will become commonplace.

CONCLUSION

For the aforestated reasons, your *amicus* requests this Honorable Court to reverse the decision of the U.S. Court of Appeals for the Seventh Circuit and determine that, with the exception of the fair venue provision found at 15 U.S.C. § 1692i, the FDCPA does not apply to attorneys engaging in litigation activities.

Respectfully submitted,

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December 15, 1994

Appendix A

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

George W. Heintz, et. al.	*	
Petitioners	*	
vs.	*	Case No: 94-367
Darlene Jenkins	*	
Respondent	*	

The undersigned attorney for Petitioners in the above-entitled matter hereby consents to the filing of an Amicus Curiae Brief supporting the position of the Petitioners by the National Association of Retail Collection Attorneys.

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Appendix A

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

George W. Heintz, et. al. *

Petitioners *

vs. * Case No: 94-367

Darlene Jenkins *

Respondent *

The undersigned attorney for Respondent in the above-entitled matter hereby consents to the filing of an Amicus Curiae Brief in support of the Petitioners by the National Associations of Retail Collection Attorneys.

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